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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: LIN 07 012 53944 Office: NEBRASKA SERVICE CENTER Date: JUN 05 2009

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).[1] The director determined that the petitioner had not established that the petition requires at least a bachelor degree or equivalent and five years of experience in the job offered or five years experience in a related occupation and, therefore, that the beneficiary cannot be found qualified for classification as a member of the professions with an advanced degree. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 8, 2007 denial, the single issue in this case is whether or not the petitioner has established that the petition requires at least a bachelor degree or equivalent and five years of experience in the job offered or five years experience in a related occupation such that the beneficiary may be found qualified for classification as a member of the professions with an advanced degree.

Section 203(b)(2)(A)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to qualified members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed with U.S. Citizenship and Immigration Services (USCIS) on October 13, 2006. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a "member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver)."

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[1] The ETA Form 9089 indicates that there is no education or training requirement for the proffered position. However, it does indicate that there is a requirement of 48 months of experience in the job offered for the proffered position.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

On appeal, counsel submits a brief and an amended Form I-140, Immigrant Petition for Alien Worker, and states:

> The I-140 form was filed with the Nebraska Service Center in October 2006, and by mistake, Part 2, letter "d" was checked instead of Part 2, letter "e." The petition is based on an approved labor certification for a skilled worker.
>
> On August 8, 2007, a corrected form was sent to Nebraska Service Center requesting the Service to incorporate the revised form with Part 2, letter "e" checked. See enclosed.
>
> We are again sending a revised I-140 form with Part 2, letter "e" checked accordingly.
>
> Please continue processing this petition pursuant to 203(b)(3)(A)(i) of the Act.

The regulation at 8 C.F.R. § 204.5(k) states in pertinent part:

> (1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(2) of the Act as an alien who is a member of professions holding an advanced degree or an alien of exceptional ability in the sciences, arts or business. . . .
> (2) Definitions. As used in this section: Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree. . . .

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

(3) Initial evidence. The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The regulation at 8 C.F.R. § 204.5(*l*) states in pertinent part:

(1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.

(2) Definitions. As used in this part:

Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

(3)(i) Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market. . . . .

(ii) Other documentation –

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In this case, the ETA Form 9089, Application for Permanent Employment Certification, indicates that there is no education or training requirement for the proffered position. It does indicate that there is a requirement of 48 months of experience in the job offered for the proffered position. However, the petitioner requested classification on Form I-140 as a "member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver)."[4]

There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

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[4] The AAO notes that on appeal, counsel claims that on August 8, 2007, "a corrected form was sent to the Nebraska Service Center requesting the Service to incorporate the revised form with Part 2, letter "e" checked." In addition, counsel has submitted a copy of a United States Postal Service Track & Confirm report that shows that a package was delivered to the Service Center director on August 10, 2007 in Lincoln, Nebraska. However, there is no evidence in the file that establishes that the package contained the corrected form. Furthermore, the record does not show the corrected form being placed in the record until counsel appealed the director's decision. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, as the director decided the petition under the advanced degree (Form I-140 2.d.) category, the petitioner cannot amend the petition's category on appeal.

The evidence submitted does not establish that the petition requires at least a bachelor degree or equivalent and five years of experience in the job offered or five years experience in a related occupation such that the beneficiary may be found qualified for classification as "a member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver) worker."

Beyond the decision of the director, the Form ETA 9089 was not signed by the beneficiary, counsel or the petitioner. To be valid, the Form ETA 9089 must be signed by the alien beneficiary, counsel and the petitioner at Section L, Section M and Section N, respectively. *See* 20 C.F.R. § 656.17(a)(1). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Furthermore, it is noted that the letter submitted to document the beneficiary's experience is insufficient. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(k)(3) as an alien with an advanced degree (or if properly refiled pursuant to 8 C.F.R. § 204.5(l)(3) as a skilled worker):[7]

> Initial evidence. The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

[7] For a skilled worker, the petitioner would need to demonstrate:

> (ii) *Other documentation—*
>
> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

> (i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
>
> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In the instant case, the experience letter submitted to document the beneficiary's experience is insufficient to meet regulatory requirements. Form ETA 9089 requires 48 months of experience as a carpenter. The experience letter submitted does not separate the beneficiary's experience between helping to install wood roof trusses and the beneficiary's actual carpentry duties, does not give the exact dates the beneficiary worked as a carpenter, whether he worked continuously on a full-time basis, or was employed part-time, and does not provide a description of the beneficiary's carpentry experience. Therefore, the letter is insufficient to document that the beneficiary has the required experience for the job offered.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.